

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

SUMM. FOR JUDGMENT NO.108 OF 2004

IN

SUMM.SUIT NO.4013 OF 2003

Ashok Kumar Prop. of M/s A.K.Enterprise.Plaintiff

versus

M/s Vidyut Metallica Ltd .. Defendant

Mr Kumar Desai i.b Anand Kumar & Daulat Jehangir for
Plaintiff.

Ms.A.Ghone i.b DSK Legal for Defendant

CORAM : D.G. KARNIK, J

DATED : 12th April 2005.

P.C:-

1. Heard learned counsel for the parties. The plaintiff placed an order on the defendant for the supply of the goods. The plaintiff paid to the defendant an advance of Rs.48,40,000/- by three different pay slips/demand drafts. According to the plaintiff, the defendant never supplied the goods to them and therefore the plaintiff has filed this suit

for the recovery of the advance of Rs.48,40,000/- and interest thereon.

2. By filing an affidavit in reply the defendant has contended that the defendant had supplied some goods in the past at a concessional rate for the purpose of export to in Nepal. However, the defendant never exported the goods to Nepal and sold them in India and therefore the plaintiff sent to the defendant a bill for the difference in price of the previous supplies namely normal price and the concessional price for the export. The defendant is therefore entitled to adjust the value of that bill in the advance paid by the plaintiff.

3. Purchase orders placed by the plaintiff did not show that the plaintiff had purchased the goods for the purpose of export. In any event having purchased the goods it was the choice of the plaintiff to decide in what manner the goods purchased by it should be used. Furthermore, this was in relation to the past supplies and not in respect of the suit transaction. Admittedly the plaintiff has paid the advance and the defendant has not supplied the goods. As the defendant has not supplied the goods, the plaintiff is

entitled to the refund of the money paid by the plaintiff.

4. The plaintiff had filed a petition bearing Company Petition No.1185 of 2001 for winding up of the defendant company on account of non payment of the advance paid by the plaintiff. By an order dated 30th July, 2002 the Company Court directed the defendant company to deposit in the court Rs.48,40,000/- within 12 weeks failing which Company Petition was to stand admitted. The court further permitted the plaintiff to withdraw the money, if deposited. I am informed at the bar that in pursuance of the said order, the defendant company has deposited the money. On appeal, by an interim order the Appellate Court has permitted the plaintiff to withdraw the money by furnishing a bank guarantee. However, being unable to furnish a bank guarantee the plaintiff has not withdrawn the said money.

5. In my view, since the defendant has admitted the receipt of the money and there is no dispute that the defendant has not supplied any goods to the plaintiff in pursuance of the said order, there is no defence of substance available to the defendant. In the

circumstances, the defendant can only be granted conditional leave to defend the suit subject to depositing the principal amount.

6. Accordingly, the defendant is granted conditional leave to defend the suit subject to depositing of Rs.48,40,000/- in this court within four weeks. The defendant shall have the liberty to treat Rs.48,40,000/- which it has already deposited in the Company court as a deposit towards the suit account. This option can be exercised by the defendant by filing an undertaking in this court that it shall not withdraw the said money already deposited in the court without the leave of this court. On deposit of the money or furnishing of an undertaking as above, the suit shall stand transferred to the list of commercial causes. The defendant shall file the written statement within four weeks.

D.G.KARNIK, J